

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

EDWARD LUEVANO,
Plaintiff,

CASE NO. CV F 06-0164 OWW LJO

**FINDINGS AND RECOMMENDATIONS TO
DISMISS ACTION**

vs.

PAROLE OFFICER RON HILL,
Defendant.

BACKGROUND

Plaintiff Edward Luevano (“plaintiff”) is incarcerated and proceeds pro se and in forma pauperis in this civil rights action under 42 U.S.C. § 1983 (“section 1983”). Plaintiff proceeds with a form complaint (“complaint”) to name as defendant parole officer Ron Hill (“Officer Hill”). The complaint alleges that in April 2004, Officer Hill acted “with total disregard for ethics, compassion or fairness” in connection with a photo of plaintiff appearing in the Fresno Bee. The complaint seeks monetary and punitive damages.

DISCUSSION

Standards For Screening

This Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). This Court must dismiss a complaint, or portion thereof, which “is frivolous, malicious or fails to state a claim upon which relief may be granted” or “seeks monetary relief from a defendant who is immune from such

1 relief.” 28 U.S.C. § 1915A(b)(1) and (2). Moreover, “[a] trial court may dismiss a claim sua sponte
2 under Fed.R.Civ.P. 12(b)(6). . . . Such dismissal may be made without notice where the claimant cannot
3 possibly win relief.” *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9th Cir. 1987); *see Wong v.*
4 *Bell*, 642 F.2d 359, 361-362 (9th Cir. 1981). Sua sponte dismissal may be made before process is served
5 on defendants. *Neitzke v. Williams*, 490 U.S. 319, 324 (1989) (dismissals under 28 U.S.C. § 1915(d)
6 are often made sua sponte); *Franklin v. Murphy*, 745 F.2d 1221, 1226 (9th Cir. 1984) (court may dismiss
7 frivolous in forma pauperis action sua sponte prior to service of process on defendants).

8 Since plaintiff proceeds in forma pauperis, this Court, notwithstanding any filing fee that may
9 have been paid, shall dismiss a case at any time if the Court determines the action is frivolous, malicious,
10 fails to state a claim on which relief may be granted, or seeks monetary relief against an immune
11 defendant. *See* 28 U.S.C. § 1915(e); 2 Schwarzer, Tashima & Wagstaffe, California Practice Guide:
12 Federal Civil Procedure Before Trial (2005) Attacking the Pleadings, para. 9:226.1, pp. 9-65. A court
13 need not accept as true factual allegations in in forma pauperis complaints and may reject “completely
14 baseless” allegations, including those which are “fanciful,” “fantastic” or “delusional.” *Denton v.*
15 *Hernandez*, 504 U.S. 25, 32, 112 S.Ct. 1728, 1733 (1992).

16 A claim is legally frivolous when it lacks an arguable basis either in law or fact. *Neitzke*, 490
17 U.S. at 325; *Franklin*, 745 F.2d at 1227-1228. A federal court may dismiss a claim as frivolous where
18 it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless.
19 *Neitzke*, 490 U.S. at 327.

20 The test for maliciousness is a subjective one and requires the court to “determine the . . . good
21 faith of the applicant.” *Kinney v. Plymouth Rock Squab Co.*, 236 U.S. 43, 46 (1915); *see Wright v.*
22 *Newsome*, 795 F.2d 964, 968 n. 1 (11th Cir. 1986). A lack of good faith is found most commonly in
23 repetitive suits filed by plaintiffs who have used the advantage of cost-free filing to file a multiplicity
24 of suits. A complaint is malicious if it suggests an intent to vex defendants or abuse the judicial process
25 by relitigating claims decided in prior cases. *Crisafi v. Holland*, 655 F.2d 1305, 1309 (D.C. Cir. 1981);
26 *Phillips v. Carey*, 638 F.2d 207, 209 (10th Cir. 1981); *Ballentine v. Crawford*, 563 F.Supp. 627, 628-629
27 (N.D. Ind. 1983); *cf. Glick v. Gutbrod*, 782 F.2d 754, 757 (7th Cir. 1986) (court has inherent power to
28 dismiss a case demonstrating “clear pattern of abuse of judicial process”). A lack of good faith or malice

1 also can be inferred from a complaint containing untrue material allegations of fact or false statements
2 made with intent to deceive the court. *See Horsey v. Asher*, 741 F.2d 209, 212 (8th Cir. 1984).

3 A complaint, or portion thereof, may be dismissed for failure to state a claim if it appears beyond
4 doubt that plaintiff can prove no set of facts in support of the claim or claims that would entitle him to
5 relief. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41,
6 45-46, 78 S.Ct. 99 (1957)); *see also Palmer v. Roosevelt Lake Log Owners Ass'n*, 651 F.2d 1289, 1294
7 (9th Cir. 1981). “[W]hen a federal court reviews the sufficiency of a complaint, before the reception of
8 any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not
9 whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to
10 support claims.” *Scheurer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 1688 (1974); *Gilligan v. Jamco*
11 *Development Corp.*, 108 F.3d 246, 249 (9th Cir. 1997).

12 As further explained below, the complaint demonstrates plaintiff is entitled to offer no evidence
13 for its vague, unsupportable claims.

14 The Complaint’s General Deficiencies

15 F.R.Civ.P. 8 establishes general pleading rules and provides in pertinent part:

16 (a) Claims for Relief. A pleading which sets forth a claim for relief . . . shall
17 contain (1) a short and plain statement of the grounds upon which the court’s jurisdiction
18 depends, unless the court already has jurisdiction and the claim needs no new grounds
19 of jurisdiction to support it, (2) a short plain statement of the claim showing that the
20 pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader
21 seeks.

22 . . .

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise and direct.

23 A pleading may not simply allege a wrong has been committed and demand relief. The
24 underlying requirement is that a pleading give “fair notice” of the claim being asserted and the “grounds
25 upon which it rests.” *Conley*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 103 (1957); *Yamaguchi v. United States*
26 *Dept. of Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997). Although a complaint need not outline all
27 elements of a claim, “[i]t must be possible . . . for an inference to be drawn that these elements exist.”
28 *Walker v. South Cent. Bell Telephone Co.*, 904 F.2d 275, 277 (5th Cir. 1990); *Lewis v. ACB Business*

1 *Service, Inc.*, 135 F.3d 389, 405-406 (6th Cir. 1998).

2 Despite the flexible pleading policy of the Federal Rules of Civil Procedure, a complaint must
3 give fair notice and state the elements of the claim plainly and succinctly. *Jones v. Community Redev.*
4 *Agency*, 733 F.2d 646, 649 (9th Cir. 1984). A plaintiff must allege with at least some degree of
5 particularity overt facts which defendant engaged in to support plaintiff's claim. *Jones*, 733 F.2d at 649.
6 Here, the complaint fails to comply with F.R.Civ.P. 8(a)(2) to provide fair notice of a cognizable claim
7 against Officer Hill and to demonstrate that plaintiff is entitled to relief as to Officer Hill. The complaint
8 fails to set forth specific acts, omissions or wrongs to give rise to a cognizable claim against Officer Hill.
9 The complaint fails to allege with requisite degree of particularity specific overt acts of Officer Hill to
10 give rise to a cognizable claim and in turn, resulting damages from Officer Hill's alleged overt acts. The
11 complaint makes vague references to photographing plaintiff and information given to a newspaper.
12 Because the complaint fails to satisfy F.R.Civ.P. 8(a)(2) requirements, it must be dismissed.

13 **The Complaint's Section 1983 Deficiencies**

14 The Civil Rights Act, under which this action was filed, provides:

15 Every person who, under the color of [state law] . . . subjects, or causes to be subjected,
16 any citizen of the United States . . . to the deprivation of any rights, privileges, or
17 immunities secured by the Constitution . . . shall be liable to the party injured in an action
at law, suit in equity, or other proper proceedings for redress.

18 42 U.S.C. § 1983.

19 To state a section 1983 claim, a plaintiff must plead that: (1) defendants acted under color of state
20 law at the time the complained of act was committed; and (2) defendants deprived plaintiff of rights,
21 privileges or immunities secured by the Constitution or laws of the United States. *Gibson v. United*
22 *States*, 781 F.2d 1334, 1338 (9th Cir. 1986). The complaint fails to state colorable claims (or any claims
23 for that matter) against Officer Hill in that it makes vague allegations regarding plaintiff's photograph
24 in the Fresno Bee. The complaint fails to demonstrate that Officer Hill acted under color of state law.
25 The complaint articulates no deprivation of a right, privilege or immunity secured by the Constitution
26 or laws of the United States.

27 Section 1983 requires that there be an actual connection or link between the actions of defendant
28 and deprivation allegedly suffered. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978);

1 *Rizzo v. Goode*, 423 U.S. 362 (1976). The Ninth Circuit Court of Appeals has held that “[a] person
2 ‘subjects’ another to deprivation of a constitutional right, within the meaning of section 1983, if he does
3 an affirmative act, participates in another’s affirmative acts or omits to perform an act which he is legally
4 required to do that causes the deprivation of which complaint is made.” *Johnson v. Duffy*, 588 F.2d 740,
5 743 (9th Cir. 1978). The complaint fails to satisfy the linking requirement as to Officer Hill and to
6 articulate how Officer Hill deprived plaintiff of constitutional rights and resulting harm.

7 **Malice**

8 This Court is concerned that plaintiff has brought this action in absence of good faith and
9 attempts to take advantage of cost-free filing to vex Officer Hill, a symbol of authority with whom
10 plaintiff appears disgruntled. Such attempt provides further grounds to dismiss plaintiff’s complaint.

11 **CONCLUSION AND RECOMMENDATION**

12 Accordingly, this Court RECOMMENDS to DISMISS this action without prejudice on grounds
13 that the complaint fails to satisfy pleading requirements and to allege cognizable section 1983 claims
14 and appears intended to vex Officer Hill.

15 These findings and recommendations are submitted to the district judge assigned to this action,
16 pursuant to 28 U.S.C. § 636(b) and this Court’s Local Rule 72-304. No later than April 11, 2006,
17 plaintiff may file written objections with the Court and serve a copy on the magistrate judge in
18 compliance with this Court’s Local Rule 72-304(b). Such a document should be captioned "Objections
19 to Magistrate Judge's Findings and Recommendations." The district judge will then review the
20 magistrate judge’s ruling pursuant to 28 U.S.C. § 636(b). Plaintiff is advised that failure to file
21 objections within the specified time may waive the right to appeal the district court's order. *Martinez*
22 *v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

23 **Plaintiff is admonished not to attempt to file an amended complaint as plaintiff’s recourse**
24 **is to object to these findings and recommendations. Plaintiff is further admonished this Court will**
25 **strike any papers to attempt to file an amended complaint unless this Court specifically grants**
26 **plaintiff permission to file an amended complaint.**

27 IT IS SO ORDERED.

28 **Dated: March 9, 2006**

/s/ Lawrence J. O'Neill

1 66h44d

UNITED STATES MAGISTRATE JUDGE

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28